

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
BROWN, KAREN, et al., : Docket #1:15-cv-04091-
 : PKC-GWG
 :
Plaintiffs, :
 :
- against - :
 :
THE CITY OF NEW YORK, et al., : New York, New York
 : March 29, 2019
Defendants. :
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PROCEEDINGS BEFORE
THE HONORABLE JUDGE GABRIEL W. GORENSTEIN,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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THE CLERK: In the matter of Brown v. The City of New York, Docket No. 15-cv-4091.

Counsel, please state your appearances.

MR. JASON LEVENTHAL: Jason Leventhal for plaintiff, Karen Brown. Good morning, your Honor.

MR. JOSHUA MOSKOVITZ: Joshua Moskovitz, also for the plaintiff. Good morning, your Honor.

MS. ANGHARAD WILSON: Angharad Wilson for the defendants. Good morning, your Honor.

MS. KEANA WILLIAMS: Keana Smith Williams for defendants. Good morning, your Honor.

HONORABLE GABRIEL W. GORENSTEIN: Okay. Good morning. You can have a seat if you're not speaking.

All right, so we're here based on originally a letter, Docket 206, from the plaintiff, and then two letters regarding discovery, 208 and 209.

So I want to separate out -- I already separated out, I should say, the question of what discovery needs to be done before there's to be a motion for sanctions. But I guess I want to separate out the discovery into discovery on the merits that was occasioned by the late production, which may have been completed -- I don't know -- and discovery on the issue of what sanctions are appropriate, if there is to be any. And I assume that the first one is

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1 done; but if I'm wrong, Mr. Leventhal, you should tell me.

2 MR. LEVENTHAL: Judge, we have conducted, I
3 believe -- hopefully, it's substantially all that
4 discovery. I believe the City has agreed to search for all
5 potential notes from all potential investigators that were
6 involved. They had indicated that they may have located
7 some additional notes and memo books that they were
8 preparing to turn over. I believe that was the extent of
9 it.
10

11 THE COURT: Okay. So I'm assuming that's not
12 going to be an issue.

13 So I want to deal with No. 2. And then -- you
14 know, it just occurred to me -- do you know -- I shouldn't
15 be asking you to read Judge Castel's mind, but do you know
16 if he wanted me to do the motion for sanctions? I know
17 he's doing the summary judgment motion. Or don't you know
18 the answer to that question? Did he say one way or the
19 other at any point?

20 MR. LEVENTHAL: He didn't, Judge, no.

21 THE COURT: All right, I'd better ask him that.

22 But, certainly, I need to do the discovery pieces
23 of the letter. So let's -- I mean, let's talk about it.
24 Here, Mr. Leventhal, the City does have a point, which is
25 this is not a spoliation case. So, you know, discovery

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that I would normally allow as to how evidence got
spoliated doesn't seem terribly relevant here. And I
certainly understand your need for maybe something on this
because you are seeking sanctions; and if they willfully or
negligently or grossly negligently delayed in producing the
discovery, you know, perhaps there's something that can be
done from a Rule 37 perspective. And I'm not saying for
sure you would get an affidavit as to what they did and how
and how it came about that it was late; but let's assume I
did give you that, what more do you need?

MR. LEVENTHAL: Judge, I believe that's what we
need is the affidavits that we disclosed in our letter
yesterday. We are in --

THE COURT: Well, now it's been pluralized if I
heard you correctly. Did you say -- use plural,
affidavits?

MR. LEVENTHAL: Well, whatever affidavit,
affidavits, whatever it takes to --

THE COURT: Yes, whatever it takes to explain why
these items showed up, you know, months after they were
presumably asked for and due.

MR. LEVENTHAL: Yes.

THE COURT: Okay.

MR. LEVENTHAL: With regard to spoliation, I do

1 want to make clear that we believe that Detective
2 Fernandez's notes have been spoliated. And I can explain
3 that to your Honor. Detective Fernandez was disclosed
4 recently as an investigator who interviewed EMS personnel
5 who treated Mr. Williams at the scene.

6
7 THE COURT: What's his name again?

8 MR. LEVENTHAL: Javier Fernandez.

9 THE COURT: Fernandez. Okay.

10 MR. LEVENTHAL: He was disclosed in the 44th
11 Precinct detective investigation file. We deposed him --

12 THE COURT: You deposed him?

13 MR. LEVENTHAL: We deposed him.

14 THE COURT: Okay.

15 MR. LEVENTHAL: And he stated that he may have
16 taken -- he interviewed EMS personnel witnesses; that he
17 took notes; that he didn't know what those notes contained
18 other than he was certain that it contained the pedigree
19 information that he had included in his formally-filed
20 report on that interview, but there may have been other
21 notes -- may have been -- other notes with substantive
22 notes of those interviews; and that he searched for those
23 notes; that he found notes from before this incident and
24 after this incident but was not able to locate any notes
25 whatsoever from the interviews with EMS personnel.

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2 THE COURT: Okay. So what more discovery do you
3 need as to those notes, then?

4 MR. LEVENTHAL: Well, I think it just -- I think
5 we are fine with the affidavits that we requested in terms
6 of disclosing the circumstances of the parties' and the
7 City's efforts to collect -- locate, collect and preserve
8 evidence. I think that's what we need for those notes, as
9 well.

10 THE COURT: Okay, so you're imagining an aff --
11 a generic -- I wasn't -- I'm not saying again we're having
12 an affidavit or we're not having an affidavit, but I was
13 positing an affidavit regarding the late disclosure. And
14 I guess you assume such an affidavit would have to, on a
15 more overall basis, describe the efforts to preserve. So
16 I think there might have been, Mr. Leventhal, a little
17 disconnect between you and I on that. I was thinking more
18 in terms of the late disclosure, and I was saying why
19 would you need more than affidavit about why these three
20 categories of documents were not produced initially, which
21 would presumably involve someone, maybe the attorneys,
22 saying, "Well, I need to go here and here. And we assumed
23 this would have" -- you know, whatever it is, there's
24 going to be some explanation. That's the affidavit I was
25 imagining. You're talking about something different,

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which is whatever the process is for maintaining that person's notes, was anything done to stop the process of throwing them out or to preserve them, or something like that, which I don't think would require, you know, some generic affidavit about preservation of evidence in the entire case, but would have to be directed to those notes.

So that sounds like those are the two things you want, then: affidavit as to the late disclosure; and an affidavit as to the preservation efforts as to Fernandez's notes. Is that fair, Mr. Leventhal?

MR. LEVENTHAL: Judge, I think it's beyond that. Under Rule 37 we need to explore why this evidence wasn't disclosed timely. And the City's duty to collect and preserve and what they did would be relevant to why it wasn't disclosed timely. So I think --

THE COURT: Well, I think preservation is not terribly relevant to timeliness. They do a search for -- in response to your document requests; they make a production; and then months later they find things that are responsive. That's not a preservation issue to me; that's a was -- you know was the original effort good enough, and how did it come about that the later disclosure happened. Are you with me so far?

MR. LEVENTHAL: I am.

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THE COURT: Okay. Preservation, you've now made a case that you have an interest in that issue as to Fernandez's notes. So I'll ask you again: Is there something beyond that that you're looking for?

MR. LEVENTHAL: As to preservation?

THE COURT: As to anything.

MR. LEVENTHAL: Well, Judge, it all is a -- the big picture has to be looked at here. So initially in October the City tells us that they destroyed audio recordings. And I understand that those recordings actually weren't destroyed; they've been found. So we don't have a spoliation issue with those audio recordings. However, the reason why -- one of the reasons why the recordings weren't timely produced is because the original recording was destroyed. And it shouldn't have been. So I think the efforts taken to preserve, coupled with collect and produce -- so preserving evidence, the obligation to preserve evidence also requires you to collect it, to find it and collect it and preserve it. So I think all of those efforts from when their obligation first began are important for our motion.

THE COURT: Because?

MR. LEVENTHAL: Because --

THE COURT: You've got to understand the two

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2 affidavits I am imagining. Tell me what's not in them
3 that you need.

4 MR. LEVENTHAL: The City's efforts to locate,
5 collect -- preserve, collect evidence. I believe your
6 Honor is saying that an affidavit of what you did to
7 produce the evidence --

8 THE COURT: Okay, but can we just -- you're
9 doing so much in one sentence. To me, collecting -- an
10 affidavit about collecting evidence is completing
11 different than the effort to preserve. Those are like two
12 different things. People preserve evidence; that's all
13 fine. And then someone has to go out and collect them.
14 All right? So tell me -- I think that if you got the
15 affidavit about why there was a late disclosure, you're
16 going to have to get evidence about the effort to collect
17 because they're going to say, "Well, when we got your
18 interrogatories, we checked this place and this place,"
19 and either, "We forgot to do this place," or, "Someone
20 didn't know it existed." There's going to be some
21 explanation about the collection. So that's fine. It's
22 the preservation piece that I still need to get you to
23 make me understand. I understand your issue in getting
24 information on preservation as to Fernandez's notes. Tell
25 me why you need information about preservation more

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2 generally than that.

3 MR. LEVENTHAL: I think it goes directly to the
4 audio recording. So the audio recording, if it would have
5 been preserved in its original form in the NYPD
6 Communication Bureau, it would have been timely produced.
7 The City has indicated that it wasn't preserved, that it
8 was destroyed, and that's why it wasn't timely produced.
9 They subsequently then found it in another file.

10 THE COURT: A copy, you're saying?

11 MR. LEVENTHAL: A copy of it, in another file.
12 So the reasons why that recording wasn't timely produced
13 also implicate why it wasn't preserved. If it would have
14 been preserved, it would have been timely produced.
15 They're saying it was destroyed; they didn't preserve it.

16 THE COURT: I guess I understand. The problem
17 is that you haven't been prejudiced by that destruction.
18 So it makes me wonder why we need to go backwards to talk
19 about the preservation of that recording.

20 MR. LEVENTHAL: We've been prejudiced by the
21 timeliness of the production.

22 THE COURT: Okay. I see what you're getting at.
23 You're saying -- and how have you been prejudiced other
24 than just normal taking time, you know, you getting it
25 months later?

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MR. LEVENTHAL: Well, no, we filed a summary judgment motion based on the facts that --

THE COURT: I see.

MR. LEVENTHAL: And, Judge, it was years later, not months later.

THE COURT: Okay. Well, no, now you're making -- now at least I understand. So you would be seeking sanctions, I guess, for the costs of making that motion. Was that in your list? I forget now.

MR. LEVENTHAL: Yes, your Honor.

THE COURT: So you're saying if they had properly preserved, then we would have had the recording beforehand, we wouldn't have had to file that motion, and we were prejudiced thereby. Okay, so there's at least three pieces from your point of view. One is the Fernandez notes, the effort -- why efforts to collect did not result in the late production; the production of the materials that came late; and the preservation as to the audio recording.

But, once again, it's the preservation of the Fernandez notes and the audio recording to me, not preservation generally. Why do you need to go beyond those two things?

MR. LEVENTHAL: Judge, no, not unless there is

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2 some distinction between their efforts to preserve other
3 evidence versus --

4 THE COURT: Okay. All right. So let me hear
5 from defendants as to why they shouldn't provide these
6 affidavits.

7 MS. WILSON: Well, your Honor, in the first
8 instance we would argue that these affidavits necessarily
9 implicate attorney work product and attorney-client
10 privilege, given that these --

11 THE COURT: You're saying that a litigant
12 corporate city, whatever, can't produce information about
13 efforts made to collect documents? That would be very
14 novel. How is that possible?

15 MS. WILSON: Well, our argument would be that
16 that was done at the direction of counsel and in
17 anticipation of litigation. But I think that as your
18 Honor has --

19 THE COURT: But don't you have routinely
20 depositions of document custodians who are asked where
21 documents are and where they're located and, you know,
22 what was done to produce? Is that not standard?

23 MS. WILSON: Well, certainly there are
24 depositions of individuals who are knowledgeable as to the
25 location and preservation of certain -- the location and

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preservation of certain documents.

Additionally, we would argue that, as your Honor has correctly pointed out, there isn't really a spoliation issue in this case.

THE COURT: Well, now, I've now been convinced there is as to the Fernandez notes and as to the original audio recording. Why isn't there spoliation as to those?

MS. WILSON: Well, with respect to the audio recording, it's clear that the audio recording was in fact preserved. And I'd like to make --

THE COURT: But is the explanation for why it was done late because it had been destroyed in this other file that you had looked at much, much earlier?

MS. WILSON: I'd like to clarify one point, your Honor. When plaintiff is talking about the "original" of the audio recording, that refers to the version that -- the electronic version that lives on a server. It is automatically deleted after 180 days. And so I just want to make it clear that there wasn't a copy of it sitting in a file somewhere that was destroyed; it was automatically deleted pursuant to the policy and by a computer, not by any individual.

THE COURT: Okay, well, that -- this is the very sort of thing they wanted an affidavit on. But go ahead.

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MS. WILSON: That said, they did ultimately receive the -- did receive that audio recording. And that audio recording was contained in the TBIU file, which would be one of the files that would be part of the late disclosures. So it would be the City's position that that is really more of an issue of the late disclosure of the documents as opposed to a spoliation issue in which there is some --

THE COURT: Well, whatever you call it, they're saying they want sanctions because of it, notwithstanding the fact that it was found, because the late disclosure caused them to do this unnecessary summary judgment motion, which just got knocked out. So unless you're willing to concede -- if you're willing to concede to pay the fees for that, then you don't have to provide the affidavit. But if you're not -- and I assume you're not -- then why aren't they entitled to know why it happened, to see if there's some fault on your part that should justify their getting those fees?

MS. WILSON: Your Honor, I just simply don't understand why the -- why they are distinct, they're distinct issues; that is, the issue between the late disclosure of the TBIU file, which I think that we certainly would agree had the audio recording in it, versus

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this sort of preservation-of-evidence issue regarding an audio recording that plaintiff has undoubtedly received. I think that they are clearly the same issue because the audio recording was in fact preserved in the TBIU file. The TBIU file was simply turned over late.

THE COURT: I'm not following you at all. I'm not sure what you mean by "the same issue." Let's try -- I'll give you one more shot -- let's try it this way. They're going to seek sanctions in the form of attorney's fees for having to file a motion when they didn't have evidence that was critical to it. I'm not saying they're going to get it, but they're going to ask for it. Is it going to be relevant to that issue whether you are in any sense culpable for the late production? If your answer is it doesn't matter, we will take the same position on sanctions whether we destroyed the first thing intentionally or it happened by accident, that makes no difference to the request for sanctions, and the judge could assume we did it intentionally and they would still not be entitled to that sanction, then you're right; then it's not a relevant issue. Are you prepared to take that position?

MS. WILSON: I don't believe so, your Honor.

THE COURT: Okay, well, then, it's relevant.

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So I'm not sure what's left. I'm ready to hear you. Anything else on anything else as to the affidavits? Is there anything else you haven't already said you want to add?

MS. WILLIAMS: Your Honor, if I may? On the issue of the audio recordings, I understand that it's plaintiffs' position that they had to file this summary judgment motion without having the luxury of having the recording. But they would have made the summary judgment motion, nonetheless.

THE COURT: Now you're getting to -- okay, this is my very point. They're going to make that application. We're not deciding it now. The only thing we're trying to decide is is the City's culpability for destroying that recording relevant to the motion. And I just gave you a hypothetical. I said if you're willing to say it doesn't matter whether we did it intentionally or we did it by accident, they're still not entitled to those fees, that's fine. And I won't require you to do the affidavit. But then they're going to be allowed to argue as if you had done it intentionally. So if you want to take it off the table, that's the way to take it off the table. Do you wish to stipulate that it makes no difference to their application for sanctions on the summary judgment motion

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briefing whether you destroyed the recording intentionally or unintentionally?

MS. WILLIAMS: I don't think that we want to take that position. But they also shouldn't be arguing that it was intentional when it wasn't. At the end of the day --

THE COURT: They just want to figure out --

MS. WILLIAMS: -- I don't think it's relevant.

THE COURT: -- what happened; that's why they want an affidavit.

Okay, anything else from the plaintiffs' side on this?

MS. WILLIAMS: And, your Honor, just one more thing?

THE COURT: Yes.

MS. WILLIAMS: If I will say, during the conference on the 31st we had a discussion about the audio recording and it being discovered in this TBIU file. They had the information that they're looking for. So I'm not quite sure why we're now in a position of providing an affidavit on the very same thing.

THE COURT: Well, have they got the information that you say they have?

MS. WILLIAMS: We made the representations in

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court before Judge Castel, your Honor.

THE COURT: Well, put it in an affidavit. It sounds like it will be no effort whatsoever.

MS. WILLIAMS: That's fine, your Honor.

THE COURT: Okay, so I'm directing the City to provide an affidavit on three issues. One, the preservation effort as to the audio recording that was destroyed, knowing that there was some other copy later, but still they need to do that; second, as to Fernandez's notes; and, third, they need to give an affidavit as to how it came about that the collection did not result in the timely production of the three things they produced this year. How soon can you provide the affidavit?

MS. WILLIAMS: Your Honor, we would have to consult with the police department.

THE COURT: Okay, well, then I'm just going to order a date.

MS. WILLIAMS: I would imagine that we need at least two weeks, your Honor.

THE COURT: Okay. April 12, then. That's acceptable.

Okay, so as to any other requests for discovery, I'm denying them at this time. I assume the affidavit will provide the information that's needed. I mean, we

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could have done this through an interrogatory and response, but this seems to be a more efficient way to do it now that we know exactly what we're looking for.

And I'm going to figure out from Judge Castel whether he wants me to do this Rule 37 motion or not. And if he does, I think I need a -- I think you should assume I'm doing it; and I'll let you know if it's otherwise. And you should file a letter -- Mr. Leventhal, are you with me?

MR. LEVENTHAL: Yes, Judge.

THE COURT: You should file a letter after the 12th giving me a proposed schedule for this motion.

MR. LEVENTHAL: Yes, your Honor.

THE COURT: I think that's it from my end. Anything else, Mr. Leventhal?

MR. LEVENTHAL: No, your Honor. Thank you.

THE COURT: Ms. Wilson, anything?

MS. WILSON: Nothing further, your Honor.

THE COURT: All right. Thank you, everyone.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Brown et al v. The City of New York et al, Docket #15-cv-04091-PKC-GWG, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

Carole Ludwig

Carole Ludwig

Date: April 3, 2019